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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of RENE and CARMEN G.  
CAPPADOCIA.

RENE CAPPADOCIA,

Appellant,

v.

CARMEN G. CAPPADOCIA,

Respondent.

F042056

(Super. Ct. No. CV 38455)

**OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. William G. Polley, Judge.

Hal B. Channell for Appellant.

Wayne M. Bunch for Respondent.

**-ooOoo-**

Rene Cappadocia agreed to pay Carmen Cappadocia \$30,000 to equalize the property division from the dissolution of their marriage. The payment was to be made when a piece of real property sold. No provision was made for the accrual of interest on the outstanding obligation. When the property did not sell, the trial court awarded interest from the date of the judgment. We reverse because, although the equalization payment was incorporated into the judgment of dissolution, there was an implied or express waiver of the accrual of interest.

### **PROCEDURAL AND FACTUAL SUMMARY**

Rene<sup>1</sup> and Carmen dissolved their marriage on June 17, 1995. In May 1995, the parties had entered into a Marital Settlement Agreement (MSA). The MSA was attached to and incorporated into the June 17, 1995, judgment.

One of the provisions of the MSA required Rene to make an equalization payment of \$55,000 to Carmen, \$30,000 of which was to be paid from the sale of community property located in Twain Harte. To secure payment of the \$30,000, and in accordance with the MSA, Rene executed a note secured by a deed of trust against the Twain Harte property. Rene executed the note, deed of trust and MSA on May 5, 1995. Carmen signed the MSA on May 15, 1995.

The \$30,000 note representing the equalization payment does not provide for interest to accrue on the principal. The note itself is a standard form document. The language in the standard form note that deals with interest on the principal has been deleted by typing over it with “xx” seriatim. Three full lines and portions of three other lines in the note are redacted in this manner.

Nor is there any language in the MSA specifying that interest will accrue on the \$30,000 equalization payment. Part 6, paragraph C of the MSA, which sets forth the

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<sup>1</sup> We refer to the parties by their first names, not out of disrespect but for clarity.

equalization payment and the requirement that Rene execute a note and deed of trust to secure the payment, fails to provide for an accrual of interest or a due date on the equalization payment. The MSA provides only that the \$30,000 would be paid to Carmen upon the sale of the Twain Harte property.

Part 3, paragraph A of the MSA further provides:

“Except as otherwise provided in this instrument, each of us releases the other from any and all liabilities, debts or obligations on our marital property that have been or will be incurred, and from any and all claims and demands, other than those concerning support and maintenance as wife or as husband, it being understood by this present agreement we intend to settle all aspects of our marital property rights.”

In part 13 of the MSA, the parties acknowledged that (1) each had been represented by his or her own counsel during the negotiation and drafting stages; (2) the MSA had been fully explained to each; and (3) each was fully aware of the MSA’s contents and legal effect. In addition, the MSA provided that in the event either party was required to bring an action to enforce any provision of the MSA, the prevailing party would be entitled to recover attorney fees and costs, provided, however, that the defaulting party had been given 10 days’ written notice to cure the default before action was taken by the nondefaulting party.

Carmen apparently took no action to force a sale of the Twain Harte property or to enforce the provision for payment of the \$30,000 equalization payment until several years had elapsed. A hearing was held on February 25, 1999, on a motion to establish a sale date of the property. The motion was denied without prejudice.<sup>2</sup>

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<sup>2</sup> This motion is not included in the record on appeal, only the order after hearing.

On November 8, 2001, Carmen filed a motion to correct the terms of the judgment nunc pro tunc. In that motion, Carmen alleged that at the time the MSA was signed, “it was agreed that no interest would be paid [on the \$30,000] because the sale of the property was to be imminent, which is also why there is no payment date.” The pleadings also state that “[Carmen] agreed to no interest accumulating on the remaining balance of \$30,000 ....” Carmen’s declaration in support of the motion states, “If we had realized that I would have had to wait for payment, my attorney and I would have negotiated interest accumulating on the \$30,000 balance and a payment date would have been inserted.”

In its December 3, 2001, ruling on the November 8, 2001, motion, the trial court treated the matter as motion to compel performance under the MSA. The trial court ordered the property to be listed for sale with a licensed real estate broker no later than December 7, 2001. The matter was continued to December 17, at which time a copy of the listing agreement was to be provided to the trial court.

On December 17, counsel appeared and presented the trial court with a copy of a listing agreement for the Twain Harte property. Carmen’s counsel requested that the court set a deadline for the sale of the property. The trial court scheduled a review hearing for March 25, 2002, to monitor the progress on the sale of the property.

As of March 25, 2002, the property had not sold and the trial court ordered that the property continue to be listed “at the price as previously fixed.” A continued hearing was set for June 24, 2002.<sup>3</sup>

On July 1, 2002, Carmen filed a motion to allow interest on the judgment pursuant to Civil Code section 3288.<sup>4</sup> Specifically, Carmen sought an order allowing

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<sup>3</sup> There is no order after hearing from the June 24, 2002, hearing in the record on appeal.

interest on the \$30,000 equalization payment calculated from June 17, 1995, until paid in full. This motion specifically referred to and incorporated Carmen's declaration filed in support of the November 8, 2001, motion. Rene opposed the July 1, 2002, motion.

A hearing on the motion for interest was held on July 22, 2002, at which time the trial court directed the parties to file supplemental briefs and set a further hearing for September 30, 2002. As of July 22, 2002, the Twain Harte property was still listed for sale but had not sold.

On October 18, 2002, the trial court issued its order awarding Carmen interest "at Ten Percent (10%) per annum from June, 1995, to the date that the Thirty Thousand Dollar (\$30,000) money Judgment is paid in full." Relying on *In re Marriage of Pollard* (1988) 204 Cal.App.3d 1380, the trial court found that Carmen did not expressly or impliedly waive interest on the \$30,000 and that she was entitled to interest at the legal rate from June 17, 1995, until paid in full pursuant to Code of Civil Procedure section 685.020, subdivision (a).

## **DISCUSSION**

Rene contends the trial court erred in that (1) Carmen expressly or impliedly waived interest; (2) if there is no waiver, laches should apply to preclude an award of interest; and (3) the trial court applied the wrong remedy for any default in complying with the terms of the MSA.

### **I. Standard of Review**

Both Rene and Carmen assert that this court should apply the deferential abuse of discretion standard of review to determine whether to uphold the October 18, 2002, order. They are incorrect.

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<sup>4</sup> Her motion erroneously referred to Code of Civil Procedure section 3288.

The interpretation of a written instrument, such as a marital settlement agreement, is reviewed de novo if there is no extrinsic evidence *or* if the evidence is not susceptible to conflicting interpretations. (*Lucas v. Elliot* (1992) 3 Cal.App.4th 888, 892.) If extrinsic evidence is admitted and subject to differing interpretations, an abuse of discretion standard applies. (*Ibid.*)

Because the MSA is a written instrument and the extrinsic evidence, such as Carmen's declaration, is not susceptible to differing interpretations, we apply a de novo standard of review.

## **II. Waiver**

The key issue is whether Carmen waived interest on the \$30,000 equalization payment, either expressly or impliedly. We conclude that she did.

Rene executed the MSA on May 5, 1995. On that same date, Rene executed a note for \$30,000 evidencing this obligation and a deed of trust securing the obligation. The provisions in the standard form note that provided for accrual of interest were deliberately redacted by marking these provisions with "xx" in seriatim.

Carmen executed the MSA on May 15, 1995, 10 days after Rene.

In the paragraph of the MSA that provides for the \$30,000 equalization payment, there is no provision for interest to accrue on the \$30,000. Nor is there a due date specified for payment of the \$30,000, other than upon the sale of the Twain Harte property. The MSA does provide, however, that each party is releasing the other from all claims and demands and any and all liabilities, other than as set forth in the MSA. There also is a provision in the MSA which states that the parties' signatures on the agreement constitute a representation that they understand the contents and legal effect of the MSA and have had its terms fully explained to them by their own counsel.

At the time Carmen executed the MSA, she had the note and deed of trust evidencing the \$30,000 equalization payment available for her review and approval. The only conclusion to be drawn from Carmen's execution of the MSA on May 15, 1995, is

that she approved of the terms of the MSA *and* of the form of the note and deed of trust. Had these documents not met with her approval and understanding of the agreement between the parties, she would not have signed the MSA. Nor would her counsel have signed signifying counsel's approval.

The case of *In re Marriage of Pollard, supra*, 204 Cal.App.3d at page 1380, held that "a judgment of dissolution which awards money in lieu of an in-kind division of nonmonetary community property is a money judgment on which interest accrues from the date of its entry, in the absence of an express or implied agreement by the parties to the contrary." (*Id.* at p. 1382.) In our view, the language of the MSA and the modifications to the note and deed of trust constitute an implied waiver of interest on the \$30,000 equalization payment. The redacting of the language in the standard form note that provides for interest is not a reflection of silence as to interest; rather, it is a clear indication that the parties did not intend for the \$30,000 equalization payment to accrue interest. This redaction, combined with the language of the MSA waiving all other claims and demands, constitutes clear evidence that the agreement of the parties was that no interest would accrue on the \$30,000 equalization payment.

If there was any uncertainty about the intent of the parties based upon a review of the MSA and the note and deed of trust, that uncertainty was erased by Carmen's declaration and her moving papers. In her declaration, Carmen expressly acknowledges that she did not negotiate for or request that interest accrue on the \$30,000 equalization payment. In addition, Carmen's moving papers filed in conjunction with her request for interest on the \$30,000 specifically state, "Wife agreed to no interest accumulating on the remaining balance of \$30,000 ...."

None of the cases cited by the parties persuade us to reach a different conclusion. In the case of *In re Marriage of Pollard, supra*, 204 Cal.App.3d at page 1380, the appellate court found neither an express nor an implied waiver when the document was silent as to interest and no extrinsic evidence was admitted. (*Id.* at p. 1385.)

The appellate court in *In re Marriage of Teichmann* (1984) 157 Cal.App.3d 302 held that the wife was not entitled to interest on the proceeds she was to receive from the sale of community property when there was a long delay in the sale because of market conditions and the sale was to effect a division of community property, with both spouses to share in the proceeds. (*Id.* at pp. 305, 308.)

In *Wuest v. Wuest* (1945) 72 Cal.App.2d 101, a stipulated judgment was entered in the divorce proceedings whereby husband was to pay wife a specified sum as her share of the community property. (*Id.* at p. 105.) The stipulated judgment was silent as to interest and the appellate court concluded the judgment bore interest at the legal rate in the absence of any contrary evidence. (*Id.* at p. 112.)

The evidence in this case is clear and not susceptible to differing interpretations. (*Lucas v. Elliot, supra*, 3 Cal.App.4th at p. 892.) Based upon our de novo review of the writings, we conclude that Carmen waived interest on the \$30,000 equalization payment at the time she negotiated and entered into the MSA.

Having concluded Carmen waived interest on the \$30,000 equalization payment, we need not address Rene's contention that laches should apply.

### **III. Remedies**

Carmen claimed in the trial court that she assumed and/or Rene represented that the Twain Harte property would sell and the \$30,000 equalization payment would be made in 1995 because the real property was at that time listed for sale. She maintained that had she known the real property would be taken off the market shortly after the MSA was finalized, she would have negotiated for different terms. Neither this assumption on Carmen's part nor any purported representation by Rene can serve as a basis for inserting an interest provision into the MSA. The MSA itself specifically provides that the parties are not entering into the MSA based upon any "promise, agreement or undertaking" not set forth in the MSA. Further, the trial court may not insert terms into an MSA that were

not agreed to by the parties. (See *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810.)

The trial court reserved jurisdiction to make “other orders necessary to carry out this judgment.” The burden is on Carmen to seek to enforce the MSA and, as set forth in that document, the trial court has discretion to award Carmen costs incurred in enforcing the MSA.

### **DISPOSITION**

The order entered October 18, 2002, is reversed. Costs are awarded to Rene.

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CORNELL, J.

WE CONCUR:

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VARTABEDIAN, Acting P.J.

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LEVY, J.